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In the Supreme Court of the United States

October Term 1975
No. 75-852

EDWARD J. GRASAVAGE, PAULINE GRASAVAGE, ROBERT RINALDI,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

EDWARD J. GRASAVAGE, PAULINE GRASAVAGE, ROBERT RINALDI,

Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas J. Hanlon and Carlon M. O'Malley, Jr., attorneys on behalf of the Petitioners, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A, infra) is not yet reported. The opinion of the United States District Court for the Middle District of Pennsylvania is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. When the office of Attorney General becomes vacant through resignation, illness, death, etc., may an "Acting Attorney General" serve in that office beyond the thirty (30) day limit imposed by the Vacancies Act, Title 5 U.S.C. 3345-3349?

2. If the office of Attorney General is vacant after the expiration of the 30 day period for which an "Acting Attorney General" may serve in such office, may such officer thereafter initiate an application for wiretap in violation of Title 18 U.S.C. 2516(1)?

3. Upon the expiration of the 30 days granted under the Vacancies Act (Title 5 U.S.C. 3345-3349) for which "acting officers" may serve, is not such office vacant and the President remitted to his power of appointment under Article II, Section 2 of the Constitution?

STATUTES INVOLVED

5 U.S.C. 3345 provides:

"When the head of an executive department or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appoined or the absence or sickness stops."

5 U.S.C. 3348 provides:

"A vacancy caused by death or resignation may be filled temporarily under sections 3345, 3346, or 3347 of this title for not more than 30 days."

5 U.S.C. 3349:

"A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate."

18 U.S.C. 2516(1) provides:

"(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approv-

ing the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of an offense as to which the application is made. . . ."

Article II, Section 2 provides:

"The President . . . shall have power, by and with the advice and consent of the Senate . . . nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for. . . ."

STATEMENT OF THE CASE

On or about April 24, 1972, Richard G. Kleindienst, then the purported "Acting Attorney General of the United States", authorized an application for wiretap on the telephones of several Lackawanna and Luzerne County residents: namely, Edward Grasavage, Robert Rinaldi, Daniel P. Ristagno and the Anthracite Novelty Shop.

The application for wiretap was submitted to court and approved on April 26, 1972. Thereafter, appropriate orders were entered by the court authorizing the installation of the above wiretaps.

Subsequently, Edward Grasavage, Pauline Grasavage, Thomas Zelno, Frank Pricci, Louis Riviello and Robert Rinaldi were indicted in two separate indictments as a direct result of evidence gained from the aforementioned wiretaps.

Both Edward and Pauline Grasavage were indicted to Criminal No. 15232, while the remaining three defendants were indicted to Criminal No. 73-202. Both indictments charge the defendants with violation of Title 18 United States Code Section 371 and Title 18 United States Code Section 1955.

On February 15, 1972, the then Attorney General, John N. Mitchell, announced his resignation effective March 1, 1972. President Nixon immediately announced the appointment of Deputy Attorney General Richard G. Kleindienst as Mr. Mitchell's successor and forwarded his

name to the Senate of the United States for confirmation as Attorney General.

On March 1, 1972 Mr. Kleindienst as Deputy Attorney General assumed the duties of "Acting Attorney General" by operation of law, Title 5 United States Code, 3345.

Prior to March 1, 1972, the Senate Judiciary Committee had concluded its confirmation hearings and recommended the confirmation of Mr. Kliendienst as Attorney General to the full Senate. However, on or about March 1, 1972, because of the ITT scandal, Mr. Kleindienst asked that his confirmation hearing be reopened to enable him to testify as to his part of the ITT case. This request was granted.

Thereafter, Mr. Kleindienst was confirmed by the Senate on June 8, 1972, and sworn in as Attorney General on June 12, 1972.

Prior to Mr. Kleindienst's approval of the wiretap application in the present case, he had served 55 to 69 days as "Acting Attorney General".

The defendants were tried in separate trials, convicted and sentenced.

The appeals in both cases were consolidated by order of the Third Circuit Court of Appeals dated February 7, 1975 and signed by Judge Aldisert.

REASONS FOR GRANTING WRIT

It is clear from a reading of Article II, Section 2 of the Constitution that no cabinet officer may serve in office while the Congress is in session without the advice and consent of the Senate unless the Congress shall grant such authority by legislation.

Such legislation has been enacted by the Congress to permit the temporary filling of such offices by the President. This power, however, has been severely limited and no cabinet official may exercise such power for more than 30 days. Title 5 U.S.C. 3345-3349, hereinafter referred to as the "Vacancies Act."

The Vacancies Act was considered necessary to permit departments of government to function where a death, sickness, et cetera, occurred but to permit such functions for a brief period of time (only 30 days, 5 U.S.C. 3348). Otherwise, the President could obviate the constitutional requirements of Article II, Section 2, by the simple expedient of not submitting the name of the "Acting Officer" to the Senate for confirmation.

Despite the fact that the present and prior acts have been in existence for over 100 years, there is only one case which bears directly on this point. However, numerous opinions of the various Attorneys General of the United States and one by the Comptroller General of the United States make clear that an "Acting Cabinet" official may exercise the duties of such office for 30 days (5 U.S.C. 3348) and no longer.

In response to an inquiry from Senator William Proxmire to the Comptroller General of the United States, the Comptroller General concerning the case of L. Patrick Gray III as "Acting Director of the F.B.I." issued an opinion, February 22, 1973, B-150136, which stated:

> "Therefore, our opinion is that the service of Mr. Gray as Acting Director of the Federal Bureau of Investigation is subject to the provisions of 5 U.S.C. 3346-3349, and that his continued service in that position is prohibited *since he has performed the duties thereof in excess of 30 days.* See 32 Op. Atty. Gen. 139 (1920)" (Emphasis added.)

In the same opinion, the Comptroller General also stated:

> "All five sections are derived from the act of July 23, 1868, ch. 227, 15 Stat. 168, thereafter referred to as the Vacancies Act. The time limit now found in section 3348 was 10 days as covered in the 1868 act and was increased to 30 days by the act of February 6, 1891, ch. 113, 26 Stat. 733. Congressional intent in passing the 1868 act is indicated by debate recorded in the Congressional Globe of February 14, 1868:
>
> Mr. Trumbull. *The intention of the bill was to limit the time within which the President might supply a vacancy temporarily in the case of the death or resignation of the head of any of the Departments or of any officer appointed by him by and with the advice and consent of the Senate in any of the Departments.* As the law now stands, he is authorized

to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the committee to be an unreasonable length of time, and hence they have limited it by this bill to thirty days. (Changed by floor amendment to 10 days.)

The bill also has another object. By the second section (now 5 U.S.C. 3349) it is intended to repeal all previous laws on the subject. * * * *lest there be a misapprehension about it the second section is intended to be very full and to repeal all other laws on this subject, so that the whole law in regard to supplying vacancies temporarily will be in this one act.* (Emphasis added.)

Mr. Trumbull. * * * This bill only applies to cabinet officers and the heads of Bureaus—those officers appointed by the President, by and with the advice and consent of the Senate. In case of vacancy or inability to discharge the duties of the office by any of these parties the President is authorized to detail some other officer to perform the duties for ten days in case of a vacancy, and during those ten days, of course, it will be his duty to nominate to the Senate, if the Senate is in session, some person for the office * * *" 39 Cong. Globe 1163, 1164.

It is clear that sections 3345 *through* 3349 *were intended to preclude the extended filling of an office subject to Senate confirmation without submission of a nomination to the Senate.*

Attorney General Charles Devens on December 31, 1880, issued the following opinion:

> *". . . The statutory power being exhausted, the President is remitted to his constitutional power of appointment. No appointment has been made, and there is, and can be, no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy."* (Emphasis added.) Vol. 18 Opinions of Attorney General 596 (1880)

Acting Attorney General S. F. Phillips, on August 27, 1884, commenting in an opinion on performing the duties of a vacant office—the Vacancies Act, said:

> "The temporary term therein authorized either by the mere operation of the statute, or by the action of the President, is *for no longer period than ten days."* (Emphasis by Attorney General) Vol. 18, *Opinions of Attorney General* 50, 51 (1884)[1]

Attorney General Benjamin Harris Brewster in interpreting the Vacancies Act stated on March 31, 1883:

> ". . . the President has power to temporarily fill by an appointment ad interim, as therein prescribed, a vacancy occasioned by the death or the resignation of the head of a Department or the chief of a bureau therein, for a period of ten days only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted; it is not competent for the President to appoint either

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[1] It should be noted that the Congress has since extended the 10 day period to 30 days. It should also be noted that Mr. Kleindienst assumed the duties of Attorney General by operation of law. (Title 5 U.S.C. 3345).

the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days." Vol. 17 *Opinions of Attorney General* 530, 531 (1883).

Attorney General Benjamin A. Brewster in commenting on performing the duties of a vacant office (Vacancies Act) stated on September 11, 1884, that:

> ". . . I advise you that the conclusion in that case applies also in the present—that is, that under sections 177, 179, 180 and 181 of the Revised Statutes no statutory succession or assignment of some other officer to the vacancy is valid for a longer period than ten days." Vol. 18 *Opinions of Attorney General* 58, 59 (1884).

C. B. Ames, Acting Attorney General, filed an opinion on March 15, 1920 concerning the Vacancies Act. The headnotes of that opinion state:

> "Where a vacancy occurs in the office of Secretary of State, it can not be temporarily filled for a longer period than 30 days, either by statutory succession or by designation of the President." Vol. 32 *Opinions of the Attorney General* 139, 140 (1920).

The mere fact that the office of Attorney General was vacant because the 30 day period granted to an "Acting Attorney General" under Title 5 U.S.C. 3348 had been exhausted does not mean that the operations of the Department of Justice would grind to a halt. Virtually, every other function could be carried out by the various Assistant Attorneys General who were then members of the Department.

However, the wiretap statute is unique (Title 18 U.S.C. 2516(1)) in that it places full or plenary power in the Attorney General and no one else to initiate applications for wiretap.

> "The Attorney General or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications. . . ." Title 18 U.S.C. Section 2516(1)

Since Mr. Kleindienst signed the application for wiretap in this case 55 to 69 days after he assumed his duties as "Acting Attorney General", the 30 day period imposed by Section 3348, supra, having been exhausted, he was without power or authority to initiate any application for wiretap.[2]

To permit Mr. Kleindienst to continue to carry out the functions of the Attorney General after the 30 day period granted in Section 3348, supra, would make null and void the constitutional requirement of Article II, Section 2 of the Constitution that the Attorney General be appointed with the "advice and consent" of the Senate.

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[2] Mr. Mitchell, the former Attorney General, announced his resignation on February 15 effective March 1, 1972, and left for a Florida vacation. It is not clear whether Mr. Kleindienst entered on his duties on February 15, or March 1, 1972. But in either event, the application for wiretap was signed after the statutory 30 days period granted by the statute had been exhausted.

The application for wiretap having been signed by Mr. Kleindienst on April 24, 1972.

Constitutional requirements cannot be so easily disregarded.

As the Comptroller General commented in his opinion, supra, on the Department of Justice's arguments in favor of the validity of Mr. Gray remaining as "Acting Director of the F.B.I.":

> "For there is nowhere in the Department's logic any provision for Senate confirmation except as the President might decide to nominate someone for the position."

As Attorney General Devens stated, supra:

> "The statutory power being exhausted, the President is remitted to his constitutional power of appointment. *No appointment has been made and there is, and can be, no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy.*" (Emphasis added.)

Further the act complained of was performed secretly (the initiation of the application for wiretap by Mr. Kleindienst) and the petitioners were unaware that their constitutional rights were being affected until after the act complained of was completed.

It has been repeatedly said that there is "no right without a remedy". But in the present case the petitioners had no right to complain of Mr. Kleindienst holding office beyond 30 days since they were without "standing" prior to the initiation of the wiretap application by Mr. Kleindienst to complain of his status as "acting" Attorney

General since they had not as yet suffered any "injury in fact".

Sierra Club v. Morton, 405 U.S. 727 (1972);
Laird v. Tatum, 408 U.S. 1 (1972);
Ex Parte Levitt, 302 U.S. 633 (1937).

It should be remembered that Title 18 U.S.C. 2516-(1) places full or plenary power in the Attorney General of the United States for the initiation of wiretap applications. He, himself, may initiate the application for wiretap, as was done in this case, or appoint one of his assistants to do so.

However, in the case at bar, the Office of Attorney General was vacant since Mr. Kleindienst had served as "Acting Attorney General" far in excess of the 30 days he was limited to by the Vacancies Act (Title 5 U.S.C. 3345-3349) and the President was, after the expiration of the 30 day period, remitted to his powers of appointment under Article II, Section 2 of the Constitution, which requires that such appointment be made "by and with the the advice and consent of the Senate".

CONCLUSION

The initiation of the wiretap application by Mr. Kleindienst was in violation of Title 18 U.S.C. 2516(1) and Article II, Section 2 of the Constitution.

The intiation of the application for wiretap violated the petitioners' right to privacy under the Fourth Amendment and their Fifth Amendment right to due process of law.

If the ruling by the Third Circuit is allowed to stand by this Court, it will result in a total frustration of the congressional scheme that persons authorizing applications for wiretap be subject to the "political process"—that is that they be appointed by and with the advice and consent of the Senate.

Finally, if Article II, Section 2 of the Constitution is to have any meaning the opinion of the Third Circuit should be reversed. Otherwise any President could frustrate the intent of the Founding Fathers that cabinet appointments be made with the "advice and consent of the Senate" by the simple expedient of appointing an "acting cabinet officer" and never bothering to submit the name of such "acting officer" to the Senate for confirmation.

Respectfully submitted,
THOMAS J. HANLON,
CARLON M. O'MALLEY, JR.,
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing petition were mailed to the following named attorneys at the address listed below this 16th day of December, 1975.

THOMAS J. HANLON

S. John Cottone
U. S. Attorney
Lawrence Kelly
Asst. U. S. Attorney
U. S. Attorney's Office
Scranton, Penna. 18503

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2043/2044; 75-1590/1592

United States of America

v.

Edward J. Grasavage, et al.

Edward J. Grasavage,
Appellant in No. 74-2043

Pauline Grasavage,
Appellant in No. 74-2044

Frank Pricci,
Appellant in No. 75-1590

Louis Riviello,
Appellant in No. 75-1591

Robert Rinaldi,
Appellant in No. 75-1592

Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Criminal Action No. 15232)

Submitted October 15, 1975
Before: Aldisert, Forman and Adams, *Circuit Judges*

Appendix "A"

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, that the court erred in (1) failing to suppress evidence obtained (a) in an application for a wiretap by an "acting attorney general" after the expiration of thirty (30) days in office, (b) on an order authorizing electronic surveillance in this case which was overbroad, thus violating 18 U.S.C. §2518(5), (c) with no probable cause as to the seizure of communications which "reveal the identities of the confederates, their places and manner of operation, and the nature of the conspiracy involved therein"; and (2) insufficient evidence to sustain a conviction where independent bookmakers, who are competitors, unknown to each other, unaware of each other's existence and with no common business interest, "layoff" wagers to a common bookmaker, do not constitute them as part of an illegal gambling operation consisting of five (5) or more persons vis-a-vis the independent bookmakers; it is

Adjudged and Ordered that the judgment of the district court be and is hereby affirmed.

By the Court,
(s) Aldisert
Circuit Judge

Attest:

Thomas F. Quinn
Thomas F. Quinn, Clerk
Dated: Oct. 15, 1975

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-2043/4

United States of America

vs.

Edward J. Grasavage, et al.

Edward J. Grasavage,
Appellant in No. 74-2043

Pauline Grasavage,
Appellant in No. 74-2044

Nos. 75-1590/2

United States of America

vs.

Samuel P. Ristagno, et al.

Frank Pricci,
Appellant in No. 75-1590

Louis Riviello,
Appellant in No. 75-1591

Robert Rinaldi,
Appellant in No. 75-1592

Appendix "B"

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is Ordered that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 17, 1975.

(s) Aldisert
Circuit Judge

Dated: December 2, 1975

BLEED

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-852

EDWARD J. GRASAVAGE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence derived from a court-authorized wire interception should have been suppressed because the application therefor was approved by Richard Kleindienst at a time when he was not empowered to act as the Attorney General.

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners Edward and Pauline Grasavage were convicted of conspiring to conduct and of conducting an

illegal gambling business, in violation of 18 U.S.C. 371 and 1955; after a different jury trial in the same district petitioner Robert Rinaldi was convicted of the same offenses for his participation in an unrelated illegal gambling business. Petitioners received the following sentences: Edward Grasavage, five years' probation and a $5,000 fine; Pauline Grasavage, three years' probation and a $5,000 fine; Rinaldi, three years' probation and a $1,000 fine. The court of appeals consolidated the two appeals and affirmed (Pet. App. A).

The facts are not in dispute. Evidence from a single court-authorized wire interception established the existence of two separate illegal gambling businesses, one involving the Grasavages and others, and one involving Rinaldi and others. The application for the court order was authorized pursuant to 18 U.S.C. 2516(1) on April 24, 1972, by Richard G. Kleindienst, who, as the Deputy Attorney General, had assumed the office of Acting Attorney General on March 1, 1972, upon the resignation of Attorney General Mitchell.[1]

Petitioners claim that since the Vacancies Act, 5 U.S.C. 3345, 3348, limits to 30 days the time in which a first assistant may, without congressional authorization, act as the head of an executive department upon a vacancy in that position, the authorization by Kleindienst, which occurred more than 30 days after

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[1] Kleindienst was confirmed by the Senate as Attorney General on June 8, 1972, and was sworn in four days later (Pet. 6-7, 13).

he became Acting Attorney General but before he had been confirmed as Attorney General by the Senate, was *ultra vires.*

It is well-settled, however, that defendants in criminal cases have no standing to challenge the *de jure* authority of a *de facto* officer, and petitioners do not challenge Kleindienst's *de facto* status here. *Ex parte Ward*, 173 U.S. 452; *Starr* v. *United States*, 164 U.S. 627, 630-631; *McDowell* v. *United States*, 159 U.S. 596, 601; *In re Manning*, 139 U.S. 504; *United States* v. *Joseph*, 519 F.2d 1068, 1071 n. 4 (C.A. 5), certiorari denied, February 23, 1976, No. 75-600; *Gee* v. *Smith*, 479 F.2d 642, 645-646 (C.A. 5), certiorari denied *sub nom. Gee* v. *United States*, 415 U.S. 932; *United States* v. *Chaudron*, 425 F.2d 605, 611 (C.A. 8), certiorari denied, 400 U.S. 852; *Browne* v. *United States*, 145 Fed. 1, 4 (C.C.A. 2), certiorari denied, 200 U.S. 618; *United States* v. *Alexander*, 46 Fed. 728, 729-730 (D. Idaho). Cf. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 535-537.

In any event, whatever the merits of petitioners' claim that, by virtue of the Vacancies Act, Richard Kliendienst was not acting lawfully as the Attorney General when he approved the application, all of the purposes of the wire interception statute were fulfilled in this case, and there can be no reason to suppress the evidence gathered. Whether Kliendienst was lawfully the Acting Attorney General when he authorized the interception application, or whether by then his capacity to act in that position had expired and he was again only the Deputy Attorney

General, he was the "senior officer in the Department" (*United States* v. *Giordano*, 416 U.S. 505, 521). Accordingly, the objective of 18 U.S.C. 2516 (1)—to "centralize and limit" (416 U.S. at 523) the authority to approve wire interception applications—was fully satisfied when, as the highest official in the Department of Justice and one who was "responsive to the political process" (416 U.S. at 520),[2] Kliendienst approved the application at issue here. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

[2] Kliendienst had been confirmed by the Senate as Deputy Attorney General. See 28 U.S.C. 504.

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